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Ancillary Proceeding / Bona Fide Purchaser

- **A third party may have a legal interest under state law that is sufficient to establish standing in the ancillary proceeding, and yet be unable, as a matter of federal law, to establish that he is entitled to recover under 18 U.S.C. § 1963(l)(6)(A) or (B).**
- **Under subsection (6)(A), the claimant must show that an interest in the forfeited property existed at the time the underlying crime occurred; an interest acquired after the crime occurred but before the order of forfeiture was entered must be asserted under subsection (6)(B).**
- **A bank's exercise of a set off against the defendant's bank account is not a "purchase" within the meaning of subsection (6)(B).**
- **Claimant that was on notice from press reports that defendant was engaged in criminal activities "should have known" that the defendant's assets were subject to forfeiture; thus, is not a bona fide purchaser.**
- **The Supreme Court's decision in *92 Buena Vista* does not apply to criminal forfeitures, nor does *James Daniel Good* require notice to a third party claimant before the defendant's assets are seized by the U.S. Marshals Service pursuant to an order of forfeiture.**

In a criminal forfeiture case, the district court ordered the forfeiture of all of the defendant's assets, including over $100 million on deposit at American Express Bank. Before turning over those funds to the U.S. Marshals Service; however, American Express Bank deducted $23.5 million to which it claimed a right of set off on account of debts that were owed to it by the defendant. When the government objected to American Express Bank's refusal to turn over the money, the court directed the bank to comply with U.S. Marshals Service's request and to file a third party petition in accordance with 18 U.S.C. § 1963(l) if it wanted to assert a set off interest.

When American Express Bank filed its claim, the government moved to dismiss it for lacked of

standing, asserting that the bank was an unsecured creditor. The court held, however, that when a bank exercises a right of set off under state law, it acquires a legal interest in the forfeited funds that is sufficient to establish standing under section 1963(l)(2). *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank I)*, 941 F. Supp. 180 (D.D.C. 1996).

The government then filed a motion for summary judgment, asserting that even if American Express Bank had standing, it could not establish grounds for which relief could be granted under section 1963(l)(6)(A) or (B). American Express Bank responded with five arguments: 1) it was the true owner of the $23.5 million; 2) it had a superior interest in the $23.5 million, as required by section 1963(l)(6)(A); 3) it was a bona fide purchaser for value of the money under section 1963(l)(6)(B); 4) it was exposed to liability for the subject funds in foreign courts; and 5) that the ancillary hearing procedure in section 1963(l) was unconstitutional. The court rejected all five arguments and granted summary judgment for the government.

On the first point, the court held that it is not sufficient for a third party to assert that it is the owner of the forfeited funds. To prevail in an ancillary proceeding, a claimant must assert an ownership interest that falls within one of the categories set forth in subparagraphs (6)(A) and (6)(B). There may be other types of ownership interests, but Congress has prescribed relief only for owners who fall into those two categories. Thus, American Express Bank would have to prevail on its second or third argument, or not at all.

Stated differently, a third party cannot prevail simply by showing that it has standing to file a claim. A claimant can establish standing by demonstrating a legal interest in the property as a matter of state law, yet not qualify for relief as a matter of federal law. "Although the existence and nature of American Express Bank's legal interest in the property is determined by reference to state law, federal law provides the rule of decision in determining the consequences of such an interest. . . . [Thus,] American Express Bank must do more than merely demonstrate standing before the Court can grant a motion to amend the Order of Forfeiture."

The court then considered and rejected American Express Bank's claim under section 1963(l)(6)(A). That statute requires the claimant to show that it had a superior interest in the property *at the time of the offense giving rise to the forfeiture*. The problem for American Express Bank was that it did not exercise its right of set off until the government had moved to seize the defendant's assets—*i.e.*, not until after the defendant (BCCI) had committed its criminal acts. "While the bank may have enjoyed a right of set off under New York law against BCCI's accounts, it did not exercise that right until [the defendant's assets were frozen]. Because the set offs were taken *after* BCCI committed the acts that gave rise to the forfeiture, American Express Bank cannot prevail under subsection (l)(6)(A)."

American Express Bank argued that the critical time was not when the criminal acts were committed, but when the order of forfeiture was entered. But the

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court dismissed this argument as inconsistent with both the language of the statute and the legislative intent. Section 1963(l)(6)(A) embodies the relation back doctrine, which is codified at section 1963(c).

> These provisions reflect Congress's concern that a defendant, aware of a pending investigation or indictment, would attempt to transfer the property to a third party before the defendant could be convicted and an order of forfeiture entered. Thus, Congress provided in 18 U.S.C. § 1963(c) that the critical time for evaluating the defendant's interest was the time of the commission of the criminal offense. Any attempt by the defendant thereafter to transfer an interest in the property to a third party—or any attempt by a third party to acquire an interest in the defendant's property—would be void, unless the third party was a bona fide purchaser under subsection (l)(6)(B).

The court then addressed American Express Bank's bona fide purchaser argument under section 1963(l)(6)(B), holding that "whether [the bank] is a bona fide purchaser for value is, once again, a question of federal law." The court then rejected the claim on two grounds. First, the exercise of a set off is not a "purchase" within the meaning of the statute. That term refers to the acquisition of a "tangible asset" in exchange for a thing of value. "All the bank acquired through its contractual dealings with BCCI was a cause of action for breach of contract and a right of set off under New York law. Acquisition of these legal rights is not a purchase within the meaning of subsection (l)(6)(B)."

Second, the bank failed to establish that it was "*reasonably* without cause to believe that the property was subject to forfeiture." (Emphasis added.) The question is not whether American Express Bank had actual notice of the forfeiture action; rather the question is whether American Express Bank "reasonably should have known that BCCI's assets were subject to forfeiture based on matters published in the public record." In its motion for summary judgment, the government provided the court with copies of 65 articles that appeared in the *New York Times* and *Wall Street Journal* describing BCCI's "criminal and fiscal improprieties," including some that appeared in the days immediately preceding American Express Bank's exercise of the set off. "Given the extensive public record of BCCI's misconduct, American Express Bank knew or should have known that BCCI's assets were subject to forfeiture."

American Express Bank responded that the right of a third party to recover under subsection (l)(6)(B) was expanded by the Supreme Court's decision in *United States v. 92 Buena Vista Ave.*, 507 U.S. 111 (1993). In that case, the Supreme Court held that a claimant in a *civil* forfeiture action who acquires an interest in property after the commission of the underlying crime need not be a bona fide purchaser. But the court held that *92 Buena Vista* is not applicable to a criminal forfeiture case. "In *Buena Vista*, the Court merely clarified a statutory ambiguity that existed in the *civil* forfeiture provisions of [21 U.S.C. § 881(a)(6)]. . . . The criminal forfeiture provisions of RICO simply do not contain text similar to the innocent owner exception of [section 881(a)(6)]." Since American Express Bank could not satisfy the unambiguous requirements of subsection (l)(6)(B), its claim on that ground had to fail.

The court summarily rejected the bank's fourth argument that it was liable in foreign courts for the sum it was owed by BCCI. To the extent that American Express Bank's concern was real, it was not one for which the district court could offer any relief. Moreover, the court said, even if it could offer relief, "no relief would be warranted because sophisticated international banks assume a risk that foreign liabilities will arise when they voluntarily engage in business with foreign corporations." *See United States v. Bank of Nova Scotia*, 740 F.2d 817, 828 (11th Cir. 1984).

Finally, the court turned to American Express Bank's constitutional arguments. Principally, American Express Bank argued that it was entitled, under *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), to a hearing before its property was seized by the U.S. Marshals Service pursuant to the Order of Forfeiture. The court rejected this argument on two grounds. First, *James Daniel Good* only applies to real property. More important, *Good* does not apply to the seizure of property in a criminal case where the government has

already convicted the defendant and obtained an order of forfeiture. Accordingly, the ancillary hearing procedures set forth in section 1963(l) provide third parties with all of the due process to which they are entitled.

American Express Bank had one last argument against the entry of summary judgment. Relying on *In re Moffitt, Zwerling & Kemler*, 864 F. Supp. 527, 541 (E.D. Va. 1994), American Express Bank argued that it had already dissipated the forfeited assets; therefore could not be forced to turn them over to the U.S. Marshals Service. *Moffitt* held that the substitute assets provisions of the criminal forfeiture statutes do not apply to third parties. Therefore, a law firm that accepted drug proceeds as its fee, but had already spent the fee by the time the Order of Forfeiture was entered, could not be made to disgorge any assets not traceable to the forfeited property.

But the court held that *Moffitt* was inapplicable to this case. Unlike the law firm in *Moffitt*, which acquired an identifiable *res*, American Express Bank had simply taken a credit that reduced its liabilities to the defendant and increased its net worth. While a third party, such as the *Moffitt* law firm, could conceivably dissipate a particular sum of money and retain nothing traceable to it, an entity that increases its net worth at the expense of the defendant retains the forfeitable asset at all times, unless its net worth falls below the value of the asset. *See United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1161 (2d Cir. 1986). Thus, the bank still had the assets it acquired from the defendant and could be made to disgorge them pursuant to the Order of Forfeiture.

—*SDC*

United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank II), ___ F. Supp. ___, 1997 WL 202891 (D.D.C. Apr. 22, 1997). Contact: AFMLS Attorney Stefan D. Cassella, CRM07(cassella).

Ancillary Proceeding / Motion to Dismiss / Summary Judgment / Discovery

- **When the government moves to dismiss a third party claim in the ancillary proceeding for failure to state a claim, the court must assume all facts alleged by the claimant to be true, and will grant the motion only if the claimant would not be entitled to relief under any of the alleged facts.**
- **Claimant's motion for summary judgment should be denied if the government has not yet had an opportunity to conduct discovery in the ancillary proceeding.**
- **Government acted reasonably in not requesting discovery in the ancillary proceeding until the court ruled on its motion to dismiss the third party claim.**

Defendant was convicted in a criminal case and all of its assets were forfeited, including a particular bank account. Claimant transferred funds to that bank account before realizing that it was subject to forfeiture, and subsequently argued that the wire transfer was void and that it still had title to the funds. Accordingly, when the Order of Forfeiture was issued, Claimant filed a claim in the ancillary proceeding, asserting a superior ownership interest under 18 U.S.C. § 1963(l)(6)(A).

The parties agreed that the case turned on whether Defendant's bank had "accepted" the wire transfer

within the meaning of Article 4A of the Uniform Commercial Code. If so, the funds became Defendant's property and were subject to forfeiture. If not, Claimant retained title to the funds. The government argued that no acceptance occurred and moved to dismiss the claim for failure to state a claim on which relief could be granted. Claimant filed a cross motion for summary judgment.

The court first addressed the government's motion to dismiss. It agreed that a court may dismiss a third party claim in an ancillary proceeding for failure to state a claim if the petitioner fails to allege facts that would entitle it to relief. A motion to dismiss on such grounds, however, is governed by Rule 12(b)(6) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), which requires that the court assume all facts alleged by the petitioner to be true. In this case, whether Defendant's bank had accepted the wire transfer was not purely a question of law; it involved factual issues which, if resolved in favor of Claimant, would entitle Claimant to relief. Because the court was required to assume Claimant's factual allegations to be true, the government's motion to dismiss was denied.

For similar reasons, the court denied the cross motion for summary judgment. Again, there were material issues of fact that had to be resolved to determine if an acceptance of the wire transfer had occurred. Moreover, under Rule 56(f), Fed. R. Civ. P., which the court held applied to ancillary proceedings in criminal cases, the government was entitled to conduct discovery before the court ruled on a motion for summary judgment. For this reason alone, the court held, it was obliged to deny the motion for summary judgment.

Claimant argued that the government should be estopped from asserting a need for discovery as a reason to deny the summary judgment motion because the government had over a year to request discovery, yet had never done so. But the court ruled that the government acted reasonably in waiting until its motion to dismiss was resolved before making any discovery request. "Discovery is expensive and in light of the fact that the public fisc would likely foot the bill for these discovery expenses, the United States' decision was both responsible and reasonable."

—*SDC*

United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Banque Indosuez), ___ F. Supp. ___, 1997 WL 177549 (D.D.C. Mar. 25, 1997). Contact: AFMLS Attorney Michele Crawford, CRM07(crawform).

Parallel Civil Forfeiture / *Res Judicata*

- **Dismissal with prejudice of a civil forfeiture case precludes the government from bringing a subsequent criminal forfeiture action against the same property.**
- **Third party who was a claimant in the dismissed civil case may raise claim preclusion in the ancillary proceeding in the criminal case.**

The United States filed a civil forfeiture action against real property in Maine that a drug dealer had purchased with drug proceeds and titled in the names of his in-laws. Later, after the drug dealer was indicted in Massachusetts and the Maine property was included in the criminal forfeiture count in the indictment, the civil forfeiture cases were dismissed. Ultimately, and the drug dealer pled guilty in the criminal case and agreed to the forfeiture of the Maine property. A preliminary order of forfeiture of the property was entered pursuant to 21 U.S.C. § 853.

The in-laws filed a petition in the criminal case asserting a superior interest in the property. They also

argued that because of the dismissal with prejudice in Maine, the criminal forfeiture action was barred on the basis of *res judicata* (claim preclusion). They prevailed.

The Massachusetts district court explained: "*Res judicata*, also known as claim preclusion, bars a subsequent lawsuit when 1) there was a 'final judgment on the merits' in an earlier suit involving, 2) the same parties, and 3) the same cause of action.'" It then held that the causes of action in the civil and criminal cases were identical because they were both aimed at the forfeiture of the same property. It also determined that the parties were identical (*i.e.*, the in-laws were claimants in Maine and third party ancillary petitioners in Massachusetts). "Finally, *res judicata* is applicable in a criminal forfeiture proceeding even though the prior proceeding directed against the property was civil in nature."

The government argued that its claim was not precluded because the only reason the Maine cases were dismissed was because the government had decided instead to seek forfeiture of the property in the Massachusetts criminal case. The court responded that the explanation was not supported by the record and the claimants' attorney never agreed to it. The government asked the court to exercise its inherent power not to dismiss the criminal forfeiture case as to this property, on the ground that otherwise it would work an injustice. The court felt, however, that if government counsel erred in agreeing to dismiss the case with prejudice, the government must bear the consequences.

The court did hold that the Maine dismissals with prejudice would not have barred the criminal forfeitures on the basis of collateral estoppel (issue preclusion) because no issues were actually litigated in Maine.

—BB

United States v. DeCato, 1997 WL 136339 (D. Mass. Feb. 20, 1997) (unpublished). Contact: AUSA Richard Hoffman, AMA01(rhoffman).

Excessive Fines

- **District court in Florida finds forfeiture of residence from which owner sold 15 kilograms of cocaine was not excessive under the Eighth Amendment.**

The **Eleventh Circuit** mandated the district court to reconsider whether forfeiture of a residence violated the Excessive Fines Clause of the Eighth Amendment. A drug purchase occurred at a house owned by the convicted drug dealer and his wife, the claimant. A cooperating witness testified that both the husband and wife were present during the drug transaction. The witness also testified that the claimant served as hostess for the meeting and knew about her husband's drug trafficking activities.

Based upon the proportionality test articulated in *United States v. One Parcel of Property Located at 427 and 429 Hall Street*, 74 F.3d 1165 (11th Cir. 1996), the district court compared the severity of the fine with the seriousness of the underlying offense. Thus, the court took into account the value of the residence as well as the quantity of drugs sold and the length of the prison sentence that the defendant received. In *Hall Street*, the Eleventh Circuit affirmed the forfeiture of property valued at $65,000 that was the location where the property owner sold three grams of cocaine. Here, property valued at $120,000 was the location at which the claimant's husband sold 15 kilograms of cocaine. Because there was substantially more cocaine at issue in this case than in *Hall Street* and because this defendant received a significantly longer sentence than the property owner in *Hall Street* would have received

under the sentencing guidelines, the forfeiture of the home was deemed not excessive.

—*MML*

United States v. One Parcel of Real Estate at 10380 S.W. 28th Street, ___ F. Supp. ___, (S.D. Fla. March 18, 1997). Contact: AUSA William H. Beckerleg, AFLS01(wbeckerl).

Particularity

- **District court dismisses civil forfeiture complaint for failure to identity the nature of the drug offenses that generated the cash, or the identities of the persons who committed them.**

The government filed a civil forfeiture complaint against $59,074 in currency seized from a gym bag in the back seat of an automobile. The complaint recited the facts of the traffic stop that led to the seizure of the currency and the fact that both occupants of the vehicle had previous drug arrests. It then concluded that the currency constituted "proceeds traceable to the exchange of a controlled substance in violation of . . . 21 U.S.C. § 801 *et seq.*" The claimant moved to dismiss the complaint for failure to comply with the particularity requirement in Supplemental Rule E(2). The court granted the motion on two grounds.

First, the court was concerned that the government had failed to identify the drug offenses that generated the alleged proceeds. It acknowledged that the government does not need "to trace the money to a particular identifiable transaction," but held that it does need to set forth facts connecting the seized money to a particular variety of drug trafficking activity. "Within Title II [of the Controlled Substances Act] are myriad provisions addressing distribution of various types of illegal narcotics; the Government's allegation is hardly particularized with regard to which specific provision of [the Act] was allegedly violated."

Moreover, the court was concerned that the complaint failed to identify "which person or persons are believed to have engaged in [the] predicate narcotics trafficking." In the court's view, the complaint must state whether the alleged violations were committed by the occupants of the vehicle or someone else.

Second, the court granted the motion to dismiss because the language in the complaint alleged that the seized currency was the "proceeds traceable to" a drug transaction instead of property "furnished in exchange for a controlled substance." 21 U.S.C. § 881(a)(6) authorizes forfeiture under both theories, but they are distinct. "Cash directly acquired in exchange for illegal narcotics is not 'proceeds' for purposes of section 881(a)(6), but is instead covered by the exchange provision." "Proceeds," the court held, refers to property subsequently purchased with the cash acquired in an exchange for narcotics. If the government is going to seek forfeiture under the "proceeds" provision, the court concluded, it "must give the court reasonable grounds to believe that it will be able to trace such a connection."

While granting the motion to dismiss, the court gave the government the opportunity to redraft and refile the complaint within seven days, and it held that it was unnecessary to release the property to the claimants during that time period.

—*SDC*

United States v. $59,074.00 in U.S. Currency, ___ F. Supp. ___, 1997 WL 126747 (D.N.J. Mar. 18, 1997). Contact: AUSA Peter Gaeta, ANJ02(pgaeta).

Comment: The general rule is that while the complaint must be sufficiently particular to put the claimant on notice of the offenses giving rise to the forfeiture, it is not necessary to identify specific transactions. *See United States v. Two Parcels in Russell County*, 92 F.3d 1123 (11th Cir. 1996) (when probable cause is based on evidence that the participants are generally engaged in the drug business, have no other source of income, and that the properties were bought with drug proceeds, it is not necessary to identify specific drug transactions in the complaint); *United States v. Twp. 17 R 4*, 970 F.2d 984 (1st Cir. 1992) (section 981 complaint alleging that property was purchased with drug proceeds by a fugitive using an alias between 1985 and 1988 was sufficiently particular to put the claimant on notice of the forfeiture action, and to allow him to investigate and answer the complaint); *United States v. Real Property (16899 S.W. Greenbrier)*, 774 F. Supp. 1267, 1270 (D. Or. 1991) (section 981 complaint incorporating agent's affidavit, indicating nature of the fraud scheme, and tracing funds into defendant properties, was sufficiently particular).

But the government must do more than simply state that the property was traceable to or involved in "drug trafficking" or "money laundering." *See United States v. Certain Accounts*, 795 F. Supp. 391, 395 (S.D. Fla. 1992) (complaint must allege violation of one of the referenced money laundering statutes); *United States v. One Partially Assembled Drag Racer*, 899 F. Supp. 1334 (D.N.J. 1995) (complaint that merely tracks the language of section 1956 is not sufficiently particular; complaint must show how property can be traced to SUA proceeds, or describe manner in which property was involving in effort to conceal or disguise SUA proceeds); *United States v. One 1990 Porsche Carrera*, 807 F. Supp. 371 (D. Md. 1992) (bald statement that property was "involved in a violation of section 1957" not sufficiently particular).

—*SDC*

Double Jeopardy / Jurisdiction

- **Fifth Circuit holds that *Ursery* applies to civil forfeiture of vehicle under section 881(a)(4).**
- **Government's failure to obtain stay of the mandate affirming dismissal of an indictment pending consideration of a petition for *certiorari* by the Supreme Court does not deprive the appellate court of jurisdiction over the appeal.**

The district court dismissed the defendant's indictment on double jeopardy grounds because of the earlier civil forfeiture of her vehicle under 21 U.S.C. § 881(a)(4). The court of appeals affirmed, *United States v. Perez*, 70 F.3d 345 (5th Cir. 1995), and the mandate issued without any stay notwithstanding the government's assertion that it would seek review of the double jeopardy issue in a petition for *certiorari* to the Supreme Court.

Subsequently, after its decision in *United States v. Ursery*, 116 S. Ct. 2135 (1996), the Supreme Court granted *cert.* and remanded this case to the **Fifth Circuit** to consider whether *Ursery* applied to a civil forfeiture under section 881(a)(4). *United States v. Perez*, 117 S. Ct. 478 (1996).

On remand, the court of appeals first considered whether it had jurisdiction over the appeal, given that it had not granted a stay of the mandate while the

cert. petition was pending. It concluded that it did. "If the Supreme Court retained jurisdiction to review *Perez I*, it necessarily follows that it also retained the power to remand for further consideration in light of *Ursery*."

On the merits of the appeal, the court held that forfeitures under section 881(a)(4) do not constitute punishment but merely operate "to confiscate property used in violation of the law." Accordingly, under *Ursery*, the civil forfeiture of the defendant's vehicle was not punishment.

—*SDC*

United States v. Perez, ___ F.3d ___, 1997 WL 163528 (5th Cir. Apr. 8, 1997). Contact: Trial Attorney J. Douglas Wilson, CRM04(wilsonj).

Comment: In *United States v. One 1970 36.9' Columbia Sailing Boat*, 91 F.3d 1053 (8th Cir. 1996), the Eighth Circuit reached the same result with respect to section 881(a)(4) forfeitures. Other recent double jeopardy decisions are discussed in "Quick Notes," *infra*.

—*SDC*

Administrative Forfeiture / Notice

■ Second Circuit rules that the proper remedy for inadequate notice in administrative forfeitures is a judicial hearing on the merits without recommencing the administrative forfeiture process.

Plaintiff filed a *pro se* civil complaint seeking return of currency that was seized and administratively forfeited by the Drug Enforcement Administration (DEA) in connection with plaintiff's narcotics offenses. DEA published notice and sent notices of the seizure to plaintiff's former residence and to the federal prison where plaintiff had been held before his transfer to a state prison. When the notices were returned to DEA undelivered, DEA sent no further notices. Absent any claims to the currency, DEA forfeited the seized currency administratively.

Plaintiff's complaint asserted that DEA's failure to provide adequate notice of the seizure justified return of his currency, and his supporting affidavit declared that the seized currency "had nothing to do with in any drug transaction." DEA conceded that its notice was inadequate but argued that the appropriate remedy was to allow plaintiff to proceed with his claim in the administrative forfeiture process. The district court agreed with the DEA, and plaintiff appealed.

The **Second Circuit** concluded that the district court's remedy of having DEA recommence the administrative forfeiture was contrary to the circuit's case law. The panel cited *Torres v. 36,256.80 U.S. Currency*, 25 F.3d 1154 (2d Cir. 1994) (remanding for trial on the merits where an administrative forfeiture was without adequate notice); *United States v. Giovanelli*, 998 F.2d 116 (2d Cir. 1993) (judicial decision on the merits concerning return of seized property appropriate where there was lack of proper notice for forfeiture); and *Onwubiko v. United States*, 969 F.2d 1392 (2d Cir. 1992) (claimant entitled to contest forfeiture in district court where government bears responsibility for procedural deficiency in administrative forfeiture process). The panel ruled that these cases support the view that "when the government is responsible for a known claimant's inability to present a claim, through the government's disregard of its statutory obligation to give notice (or otherwise), a hearing on the merits is

available in district court." Accordingly, the court directed the district court to consider plaintiff's claim on the merits and vacated the district court's judgment to the extent that it directed DEA to recommence administrative forfeiture proceedings.

—JHP

Boero v. Drug Enforcement Administration, ___ F.3d ___, 1997 WL 175099 (2d Cir. Apr. 14, 1997). Contact: AUSA Carl Schuman, ACTH01(cschuman).

Comment: The panel's opinion points out that district courts in the **Second Circuit** "up to this point have taken various approaches" to the remedy for inadequate notice in administrative forfeitures. *Compare Montgomery v. Scott*, 802 F. Supp. 930, 937 (W.D.N.Y. 1992) (allowing DEA to reinstitute administrative forfeiture proceedings) *with Application of Mayo*, 810 F. Supp. 121, 125 (D. Vt. 1992) (claimant entitled to return of seized property).

Also, in a footnote to its decision, the **Second Circuit** summarized the variety in the case law of other circuits concerning the remedy for inadequate notice in administrative forfeitures. The **First** and **Eighth Circuits** have ruled that when notice of administrative forfeiture is inadequate, the district court must set aside the forfeiture and either order return of the seized property or direct the government to commence judicial forfeiture in district court. *See, e.g., United States v. Volanty*, 79 F.3d 86, 88 (8th Cir. 1996); *United States v. Giraldo*, 45 F.3d 509, 512 (1st Cir. 1995); *United States v. Woodall*, 12 F.3d 791, 795 (8th Cir. 1993). The **Federal Circuit** has held that a district court can excuse a property owner's failure to comply with the statutory requirements when notice in an administrative forfeiture proceeding is inadequate. *Litzenberger v. United States*, 89 F.3d 818, 822 (Fed. Cir. 1996). The **Ninth Circuit**, upon ruling that a district court has jurisdiction over due process challenges to administrative forfeiture proceedings under 28 U.S.C. § 1331, remanded the case for an adjudication on the merits. *Marshall Leasing, Inc. v. United States*, 893 F.2d 1096, 1103 (9th Cir. 1990). The **Fifth Circuit**, in *Armendariz-Mata v. DEA*, 82 F.3d 679, 683 (5th Cir.), *cert. denied*, 117 S. Ct. 317 (1996), having found notice in an administrative forfeiture proceeding was insufficient, directed the district court to vacate the DEA's administrative forfeiture without providing further instructions.

—JHP

Notice

- **Where there is a parallel administrative forfeiture and criminal prosecution, the government must serve notice of the forfeiture on the defense attorney in the criminal case.**

The Drug Enforcement Administration (DEA) administratively forfeited currency seized from the owner's house after sending by certified mail a notice of seizure and intent to forfeit to the owner's home address. The notice apparently was received by a housemate of the owner, who signed the owner's name on the return receipt. When no timely claims to the currency were filed, DEA issued a declaration of administrative forfeiture.

The owner, following his acquittal on drug charges relating to the seized currency, filed a motion for return of the currency in the criminal case. He averred that his housemate had not advised him of the notice of seizure and intent to forfeit. He further

noted that he had contested the criminal case and a criminal forfeiture count against the same currency (he and his grandmother testified that the currency constituted the proceeds of a loan to him from his grandmother), filed a pretrial motion for return of the property in that case prior to DEA's issuance of a declaration of administrative forfeiture, and was ultimately acquitted.

The district court denied the motion. It assumed the allegations in the motion to be true and noted that neither the owner nor his defense attorney in the criminal case had been given actual notice of the parallel administrative forfeiture either from the prosecutor or through the notice mailed to the owner's house. Nevertheless, it found that delivery of the notice of seizure and intent to forfeit by certified mail received by the housemate comported with the requirements for service of process in a civil case under the Fed. R. Civ. P. The **Eighth Circuit** reversed and remanded.

Relying on *United States v. Woodall,* 12 F.3d 791 (8th Cir. 1993), the panel held that when the government is prosecuting someone who is actively contesting the criminal charges against him, including a count seeking forfeiture, but who is not contesting a related administrative forfeiture proceeding against the same property, the government knows the identity of the property owner's lawyer and has some idea that the defendant may not know of the parallel administrative forfeiture proceeding. Under these circumstances, the government is required to give actual notice to the property owner's counsel or the defendant himself.

The panel remanded the case with directions that: (1) if the owner proves lack of actual notice or actual knowledge of the administrative forfeiture proceeding, that he be given an opportunity to contest the forfeiture either by administrative petition or through a judicial proceeding; and (2) if the court finds that the owner had actual notice or knowledge, that it confirm the declaration of administrative forfeiture.

—HSH

United States v. Cupples, ___ F.3d ___, 1997 WL 194037 (8th Cir. Apr. 23, 1997). Contact: AUSA Ed Kelly, AIAS01(ekelly).

Comment: It is important to note that the panel's ruling arguably is confined only to cases in which there are parallel and simultaneous criminal and administrative forfeiture proceedings against the same property. The panel does not expressly reject the argument that notice delivered in a manner that comports with the Fed. R. Civ. P. might otherwise satisfy the dictates of due process.

—HSH

Rule 41(e) / Statute of Limitations

■ Rule 41(e) action for return of seized property must be brought within six years of the date of the seizure.

In February of 1996, plaintiff, a convicted drug offender, brought a *pro se* action under Rule 41(e), Fed. R. Crim. P., for the return of various items of personal property that had been seized by DEA in connection with his November of 1988 arrest.

The district court dismissed the action, ruling that the six-year statute of limitations under 28 U.S.C. § 2401 applies to claims for return of property seized by federal law enforcement officers. Section 2401 provides that "every civil action commenced against

the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." The court ruled that the right of action for return of seized property accrues as of the date of seizure and that section 2401 is jurisdictional in nature, requiring dismissal if its requirements are not met. Consequently, the court held that section 2401 barred the action and required its dismissal because the action had been brought more than six years after the seizure.

—JHP

Corinthian v. United States, CV-96-0945 (CPS) (E.D.N.Y. Mar. 13, 1997) (unpublished). Contact: AUSA Michael Goldberger, ANYE03(mgoldber).

Administrative Forfeiture / Rule 60(b) / Untimely Claim

- **Courts lack jurisdiction to hear motion under Rule 60(b), Fed. R. Civ. P., seeking to vacate an administrative forfeiture, but have jurisdiction for review under 28 U.S.C. § 1331.**
- **Failure to file a timely proper claim results in "abandonment" of seized property to administrative forfeiture.**
- **Civil complaint against attorney, not reversal of administrative forfeiture, is remedy for alleged negligence of counsel in failing to file a timely claim and cost bond.**

In December of 1990, the Drug Enforcement Adminstration (DEA) seized a pickup truck used to transport drugs and arrested its owner. DEA subsequently sent notice of the seizure to the owner at three addresses, including the owner's jail address. The owner received the notice in February of 1991. In addition, DEA mailed notice to the owner's attorney of record, who received the notice in March of 1991. The owner provided the amount of the cost bond to his attorney and instructed his attorney to contest the administrative forfeiture. However, DEA received the claim and a cost bond two days after the deadline for their filing.

DEA advised the owner and the attorney in writing that the claim and bond were being returned because they were late. DEA also advised them to file a Petition for Remission or Mitigation and allowed them an additional twenty days from receipt of the DEA's letter to do so. No petition was filed, and DEA forfeited the pickup truck administratively in April of 1991.

The owner later moved *pro se* under Rule 60(b), Fed. R. Civ. P., to vacate the forfeiture on the grounds that his attorney was negligent in failing to file a timely claim and cost bond and on the grounds that DEA had acted arbitrarily in rejecting the claim and bond. The court ruled that although a Rule 60(b) motion is the proper vehicle to seek to vacate a judicial forfeiture, courts lack jurisdiction to hear and rule on a motion under Rule 60(b) that seeks to vacate an administrative forfeiture. The court added that, even if Rule 60(b) applied, the owner had not requested relief from the forfeiture within one year of its entry as required by Rule 60(b). Nevertheless, the court found that it had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 to consider the owner's *pro se* motion on the merits.

The court found that DEA had not acted arbitrarily, but had taken every reasonable precaution to ensure that there was appropriate notice. The court ruled that the failure to file a timely, proper claim rendered the pickup truck "abandoned" to

administrative forfeiture. *See United States v. Castro*, 78 F.3d 453, 457 (9th Cir. 1996) (summarized and discussed in the *Quick Release* (April 1996): 19-20). Additionally, the court ruled that if the attorney's representation was lacking, the owner could not obtain reversal of the administrative forfeiture based on the alleged ineffective assistance of counsel but should file a complaint against his attorney.

—JHP

Garcia v. United States, Civil No. 96-0656-R; Crim. No. 901274-R (S.D. Cal. Mar. 19, 1997) (unpublished). Contact: AUSA John Houston, ACAS01(jhouston).

Administrative Forfeiture / Adoptive Forfeiture

- **Claimant who fails to file claim and cost bond waives illegal seizure defense.**
- **United States may adopt a seizure even if transferring the property from state authorities is not authorized.**

Law enforcement officers seized $844,520.00 from the claimant. The Drug Enforcement Administration (DEA) commenced administrative forfeiture proceedings against the funds. The claimant received and signed for the notice of seizure at his home, but did not file a claim and cost bond or otherwise contest the forfeiture. DEA forfeited the funds.

Subsequently, the claimant moved the district court to return the seized currency. When the motion was denied, he moved for reconsideration arguing that the currency was not seized from him by DEA, but by state authorities. He argued that a Missouri statute provides that "no state or local law enforcement agency may transfer any property . . . to any federal agency for forfeiture under federal law until the prosecuting attorney and the circuit judge of the county in which the property was seized first review the seizure and approve the transfer to a federal agency." Because the transfer of the currency to DEA for forfeiture was not authorized under state law, he argued, in effect, DEA had "illegally seized" the funds.

The district court denied the motion for reconsideration. The court held that a claimant's failure to follow forfeiture procedures results in an administrative declaration of forfeiture that vests title in the United States. While a claimant may assert an improper transfer as a defense to a federal forfeiture, the court said, he must raise the defense in the forfeiture proceeding, and not in a collateral equitable action. The claimant had notice of federal administrative forfeiture proceedings and failed to raise the defense of improper transfer of the funds from state to federal authorities in those proceedings. Thus, the court said, the defense was waived.

Even if the defense were properly raised, the claimant could not prevail. The court said that "the United States is entitled to adopt a seizure even where there is no authority to transfer the property." An infirmity in the transfer of the seized property, the court said, "does not taint the adoption of the seizure by a federal agency."

—MLC

In Re $844,520.00 in United States Currency, No. 95-0674-CV-W-4 (W.D.Mo. Feb. 27, 1997) (unpublished). Contact: AUSA Frances Reddis, AMOW01(freddis).

Rule 41(e) / Statute of Limitations / Laches

■ **Laches may bar Rule 41(e) relief irrespective of the statute of limitations.**

Claimants moved in 1996 for the return of a powerboat administratively forfeited by the Drug Enforcement Administration (DEA) in 1991 on the ground that, *inter alia*, they did not receive adequate written notice of seizure. The Magistrate Judge recommended that the trial court conclude that a genuine issue of material fact existed with respect to whether the government satisfied statutory and constitutional requirements for forfeiture. The Magistrate Judge further recommended that the motion was made within the six-year statute of limitations, and the claimants were sufficiently diligent in prosecuting their claim to preclude the application of the laches doctrine.

The government filed an objection to the Magistrate Judge's report and recommendation. The district court reversed the Report and Recommendation in part, and ruled that the action was barred by laches.

The court stated that laches may apply irrespective of the statute of limitations. The claim should be dismissed for laches, it said, if there is: (1) unreasonable and unexcused delay in bringing the claim; *and* (2) material prejudice to the defendant as a result of the delay. Because the claimants had undisputed actual knowledge that the powerboat was seized in December of 1990, the court said that "petitioners' 'slumbering' for more than five years before initiating legal proceedings is not diligent behavior in the eyes of the Court." Hence, the first prong of the laches defense was met.

The court further stated that the claimants' lack of diligence in pursuing their claim caused the DEA to believe that the proposed forfeiture would not be challenged by the claimants. DEA had long paid off a lien on the powerboat and disposed of it to another government agency. The court said that the government's prejudice as a result of claimants' delay in bringing the action satisfied the second prong of the laches defense. Accordingly, the court denied the motion for return of property and dismissed the action.

—MLC

Vance v. United States, ___ F. Supp. ___, 1997 WL 183825 (E.D. Mich. Apr. 3, 1997).
Contact: AUSA Joseph Allen, AMIE01(jallen).

Administrative Forfeiture / Notice

■ **Notice of forfeiture was sufficient when sent to prison where defendant was serving his sentence, the notice was signed for by a guard who testified that his practice was to deliver the notice to the addressee, and when defendant failed to present any evidence to rebut this procedural regularity.**

In 1990, the Drug Enforcement Administration (DEA) administratively forfeited $35,208.00 in United States currency and assorted gold jewelry that were seized from the plaintiff upon his arrest on federal narcotics charges. The forfeitures were based upon the same criminal conduct, but were processed separately; DEA issued declarations of forfeiture of the currency in October of 1990, and of the jewelry in November of 1990.

In 1995, the plaintiff filed a motion for return of this property in federal district court, claiming that he never received notice of the forfeitures. The court treated the motion as a civil complaint. DEA moved to dismiss the complaint or, in the alternative, for summary judgment.

With regard to the jewelry, the evidence showed that notice was sent by certified mail to the plaintiff both at his home and the prison. The notice sent to his home was returned in an envelope stamped "Return to Sender;" however, the notice sent to the prison was signed by a prison guard as evidenced by the returned postal receipt card. DEA also published notice of the forfeiture for three successive weeks.

Based upon this evidence, DEA concluded that the plaintiff had not received notice of the forfeiture. Accordingly, while the civil complaint was pending, it advised the plaintiff that it would treat the 1995 motion as a timely claim, and requested that the plaintiff either submit a cost bond or an in forma pauperis petition. Upon receipt of plaintiff's in forma pauperis petition, DEA forwarded the claim to the U.S. Attorney's Office for judicial proceedings. Thereafter, the U.S. Attorney determined that the plaintiff had received notice of the jewelry forfeiture, and directed DEA to reinstate the declaration of forfeiture.

With regard to the currency, DEA sent notice of the forfeiture to the plaintiff at the prison address, and the returned postal receipt indicated that the notice was signed by the same prison guard. Once again, DEA published notice for three successive weeks. Based upon this evidence, DEA concluded that the plaintiff had received notice of the forfeiture in 1990, and declined to reopen the forfeiture.

With this procedural history in mind, the district court proceeded to address the plaintiff's civil complaint and the government's motion. Because the plaintiff's claim could fairly be read to allege procedural deficiencies with regard to notice of the forfeitures, the court denied the government's motion to dismiss. The court also denied the government's motion for summary judgment with respect to the jewelry, but it granted the motion with regard to the currency.

Concerning the jewelry, the court held that DEA's "fickleness in rescinding and then reinstating the original Declaration of Forfeiture" created triable issues of fact concerning the adequacy of DEA's notice procedures. Notwithstanding the fact that the notice sent to the prison was signed by the prison guard, the court reasoned that DEA "shouldered an additional obligation to provide meaningful notice and an opportunity to be heard prior to reinstating the forfeiture," which DEA did not appear to satisfy.

With regard to the currency, however, the court stated that it needed to look no further than the unrebutted evidence that the notice was sent to the plaintiff at the prison. Based upon the prison guard's statement that his practice was to deliver all mail to the inmate after signing for the mail, there was a fair inference that the plaintiff actually received the notice. The court was quick to point out, however, that actual notice was not necessary. The government's burden is satisfied by providing "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

—MDR

Powell v. DEA, 1997 WL 160683 (S.D.N.Y. Apr. 7, 1996) (unpublished). Contact: AUSA Sarah Thomas, ANYS02(sthomas).

EAJA Fees

- **Where claimant is forced to move court to order the government either to return seized property or to initiate judicial forfeiture proceeding, claimant is entitled to attorney's fees.**

U.S. Customs Service seized two compressors owned by Creative Electric, Inc. (hereinafter referred to as Creative). After a long administrative process, Creative filed an action in district court seeking damages and the return of the compressors. Customs then notified Creative that it would commence an administrative forfeiture, and, in response, Creative filed a cost bond and claim—the prerequisites for triggering a judicial forfeiture.

However, rather than commencing a judicial forfeiture proceeding, the United States moved to dismiss Creative's claim for lack of subject matter jurisdiction. After oral argument, the court dismissed all damage claims against the government but ordered the government either to return the compressors or to commence judicial forfeiture proceedings within thirty days.

The government filed its forfeiture action but then returned the compressors, and the forfeiture complaint was dismissed.

Subsequently, the court awarded attorney's fees to Creative pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). The court found that Creative was a "prevailing party," within the meaning of EAJA, because the court ordered the government to either return the compressors or commence judicial forfeiture proceedings. Although this did not guarantee the return of the compressors to Creative, it was nevertheless a victory for EAJA purposes. The court also found that the government's actions in holding the compressors for a lengthy period after Creative had filed its bond and claim without commencing a forfeiture action were not substantially justified. Therefore, an award of EAJA fees was appropriate.

—MSB

Creative Electric, Inc. v. United States, 1997 WL 109210 (N.D.N.Y. Mar. 28, 1997) (unpublished). Contact: AUSA Charles E. Roberts, ANYN01(croberts).

Disposition of Property

- **Persons acting in concert with the defendant are ineligible to purchase criminally forfeited property.**

- **A district court has jurisdiction under 18 U.S.C. § 1963(f) to determine whether a prospective purchaser of property forfeited pursuant to 18 U.S.C. § 1963 is eligible to complete the purchase.**

In a criminal case in the Southern District of Florida, the government forfeited, pursuant to 18 U.S.C. § 1963, the majority interest in a partnership that controlled a card club in California. The government arranged the disposition of its interest via a merger and buy-out by a third party, and then requested the district court to confirm the proposed disposition. One of the other partners objected to the proposed disposition on the grounds that, pursuant to the partnership agreement, she was entitled to, and desired to, exercise a right of first refusal upon the proposed transfer of a partnership interest.

The court chose not to focus on the argument that the disposition of the federal interest in forfeited property was governed by the provisions of federal forfeiture law rather than by the intricacies of state partnership law. *See United States v. Cauble*, 706 F.2d 1322, 1350 (5th Cir. 1983); *United States v. L'Hoste*, 609 F.2d 796 (5th Cir. 1980). Instead, the court found that the partner objecting to the disposition was a person who had "acted in concert with the defendant" and thus was not eligible to acquire the government's interest under 18 U.S.C. § 1963(f).

In the alternative, the court observed that 18 U.S.C. § 1963(f) required the Attorney General, in disposing of property forfeited pursuant to 18 U.S.C. § 1963, to make "due provision for the rights of any innocent persons." The court viewed that language as creating a "statutory requirement that [the objecting partner] have status as an 'innocent person' [in order to purchase the government's interest]." Defining "innocent" by reference to *Black's Law Dictionary* and analogizing to the requirements of 18 U.S.C. § 1963(l)(6)(B), the court found that the objecting partner was not an "innocent person" within the meaning of the statute.

Accordingly, the court overruled the objections of the partner and approved the government's proposed disposition.

—*JGL*

United States v. Kramer, ___ F. Supp. ___, 1997 WL 136191 (S.D. Fla. Mar. 20, 1997).
Contact: AUSA James Swain, AFLS01(jswain).

Comment: We believe this is the only reported case discussing the restrictions on eligibility for the purchasing of criminally forfeited property. The case presented a close question because the language of the statute arguably prohibits purchase of forfeited property only by a person "acting in concert with the defendant [*to purchase the property*]," not, as the court found, by a person who "acted in concert with the defendant [during the commission of the crime which gave rise to the forfeiture]."

—*JGL*

Federal Debt Collections Procedures Act / Attorney's Lien / *Res Judicata*

- **Government may seek, under Federal Debt Collections Procedures Act, to collect money returned to defendant as part of a settlement of a civil forfeiture case to satisfy criminal fine.**

Judgment in the civil forfeiture case in favor of both defendant and the government, was not "against" the United States for purposes of 26 U.S.C. § 6323(b)(8).

Government brought a civil action pursuant to section 881(a)(6) against a sum of money seized incident to defendant's arrest.

The government and defendant agreed to settle the civil forfeiture by dividing the seized funds in half between them. In accordance with the civil forfeiture settlement, half of the seized money was returned to the government. While the defendant's half was still in the possession of the U.S. Marshals Service, the government served a writ of garnishment pursuant to the Federal Debt Collections Procedures Act upon it in an attempt to use defendant's half towards a criminal fine levied against him as a result of his criminal conviction.

Defendant objected to the garnishment upon two grounds: (1) the doctrine of res judicata forbids the government from relitigating the issue of the rights to the money which were already litigated in the civil forfeiture action; and (2) the defendant's half of the seized money should be applied towards the attorney's lien held by the attorney who represented him in the criminal case.

The court rejected defendant's objection to the garnishment based upon *res judicata*, holding that there is not "sufficient identity" between the civil forfeiture action and the garnishment proceeding as required to invoke claim preclusion. The court noted that the garnishment proceeding is an attempt to enforce a criminal judgment as part of a criminal proceeding which punishes a defendant for his wrongdoing. In contract, a judgment in a civil forfeiture case is not against a defendant and is remedial in nature.

However, as to defendant's second argument, the court agreed that the defendant's half of the seized money should be paid to his attorney. The court concluded that defendant's attorney had a valid attorney's lien against the money which was superior to the government's garnishment claim.

The criminal fine against defendant was levied pursuant to 18 U.S.C. § 3613(a), which treats a criminal fine as a federal tax assessment and relies upon the statutory priority scheme of the Internal Revenue Code, Title 26. Section 6323(b)(8) of Title 26 gives superpriority to attorney's liens which satisfy certain conditions except when the attorney's lien is asserted against a "judgement or amount in settlement of a claim or of a cause of action against the United States." The court framed the issue as whether the judgment in the civil forfeiture case in favor of both defendant and the government, was "against" the United States for purposes of section 6323(b)(8).

The court noted that the seized currency was not the legal property of the United States when the civil forfeiture was commenced, and the settlement of the civil forfeiture case did not require any payment from the government's coffers. Accordingly, the court concluded the civil forfeiture case was not "against" the United States; and therefore, the exception in section 6323(b)(8) did not apply.

The court then considered whether defendant's attorney had a lien which qualified for the superpriority status provided in section 6323(b)(8). To qualify, an attorney must demonstrate that: (1) the funds were created out of a judgment or settlement of a claim; (2) the local law would recognize the existence of a lien; and (3) the amount of the lien reflects the extent to which the attorney's efforts reasonably contributed to the award.

The court concluded that all three criteria were met and allowed defendant's objection to the garnishment and ordered the U.S. Marshals Service to remit the money to defendant's attorney.

—DAB

United States v. Murray, 1997 WL 136452 (D. Mass. 1997) (unpublished). Contact: AUSA George W. Vien, AMA01(gvien).

Remission Petitions

■ **Although a court generally lacks jurisdiction to review an agency's decision on a petition for remission, an exception exists if the agency fails to follow its own regulations.**

The government administratively forfeited a truck to which no one filed a claim. Later, Petitioner filed a Lienholder Remission Petition in which he alleged that he had sold the truck to the man from whom it was seized and from whom he had not received the full purchase price. The Drug Enforcement

Administration (DEA) sent Petitioner a letter advising him that it was granting complete remission. Petitioner took the letter to the U.S. Marshals' parking lot, but they would not release the truck because they had not heard from DEA. Then, DEA advised Petitioner that it had rescinded the remission because: (1) the state had no record of Petitioner's lien and his name was not on the title certificate; (2) a forensic expert questioned the authenticity of the sales contract produced by Petitioner; and (3) Petitioner refused to cooperate in an interview.

The district court explained that ordinarily, because Petitioner filed no claim and cost bond, it would have no jurisdiction to review the administrative forfeiture or the denial of the remission petition. A remission of forfeiture is neither a right nor a privilege but an act of grace. However, the court suspected that DEA's reversal of its decision to remit would "seem to run counter to traditional notions of finality in agency decisions." It declared that if DEA had acted contrary to its regulations in reversing itself, the court would have jurisdiction. Therefore, it denied the government's motion to dismiss and reopened discovery to enable Petitioner to obtain information concerning DEA's regulations.

—BB

Burke v. United States, No. 95-D-642-N (M.D. Ala. Apr. 9, 1997) (unpublished). Contact: AUSA John T. Harmon, AALM01(jharmon).

Quick Notes

■ Criminal Forfeiture

If a criminal forfeiture under 21 U.S.C. § 853 is supported by convictions on two separate counts—one for drug conspiracy under section 846 and the other for CCE under section 848—and one of the convictions is reversed on appeal, but the other survives; the forfeiture is unaffected.

United States v. Rosario, ___ F.3d ___, 1997 WL 175083 (2d Cir. Apr. 14, 1997). Contact: AUSA Sharon Cohen Levin, ANYS02(slevin).

■ Criminal Forfeiture / Bifurcated Proceedings

If a defendant wishes to testify regarding the criminal forfeiture of his property, but intends to assert his 5th Amendment right against self-incrimination with respect to his guilt or innocence, and he makes a timely motion to bifurcate the proceedings, the motion should be granted. Evidence, arguments and instructions relating exclusively to the forfeiture issues should be reserved to the forfeiture phase of the trial.

United States v. Ruedlinger, 1997 WL 161960 (D. Kan. Mar. 7, 1997) (unpublished). Contact: AUSA Richard Hathaway, AKST01(rhathawa).

■ Double Jeopardy

The **Ninth Circuit** rejected a defendant's attempt to distinguish *United States v. Ursery*, 116 S. Ct. 2135 (1996) on the ground that the civil forfeiture of his assets under 18 U.S.C. § 981(a)(1)(A) "was a punitive attempt to prevent him from adequately defending himself." As *Ursery* explained, section 981 forfeitures serve nonpunitive goals.

United States v. Amlani, ___ F.3d ___, 1997 WL 183875 (9th Cir. Apr. 16, 1997). Contact: AUSA Ronald L. Cheng, ACAC01(rcheng).

■ Double Jeopardy

Under *Ursery*, there is no double jeopardy violation when the district court takes the amount of drugs and/or drug proceeds seized from the defendant and forfeited into account in computing the sentence in his criminal case.

United States v. Vaughn, ___ F.3d ___, 1997 WL 183858 (8th Cir. Apr. 17, 1997). Contact: AUSA Tom Mehan, AMOE01(tmehan).

■ Double Jeopardy / Parallel Civil Forfeiture

The **Eighth Circuit** rejects an attempt to distinguish *Ursery* on the ground that the government's request that civil forfeiture proceeding be stayed pending completion of criminal case to avoid double jeopardy problems indicated that the civil forfeiture was punitive. To the contrary, the stay of the parallel civil case and the coordination of the civil forfeiture with the criminal prosecution proved that jeopardy never attached in a separate proceeding.

United States v. Jones, ___ F.3d ___, 1997 WL 182267 (8th Cir. Apr. 16, 1997). Contact: AUSA Jim Deoworth, AMOE01(jdewort).

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